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Supreme Court of the United States

OCTOBER TERM.

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JAMES H. McKENNEY,
Clerk

No. 102.

ANTOINETTE B. KINNEY AND CLESSON S. KINNEY,
APPELLANTS,

vs.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION,
APPELLEE.

BRIEF FOR APPELLEE.

J. NORMAN,
For Appellee.

Supreme Court of the United States

OCTOBER TERM.

No. 398.

ANTOINETTE B. KINNEY AND CLESSON S. KINNEY,
APPELLANTS,

vs.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION,
APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This suit was originally brought in the State Court of the Third Judicial District of the state of Utah. In due time, on, to wit, September 2, 1899, the following petition for removal was filed:

"PETITION FOR REMOVAL.

To the Honorable District Court of the Third Judicial District in and for the county of Salt Lake and state of Utah:

Your petitioner, The Columbia Savings and Loan Association, respectfully shows to this Honorable court that the matter and amount in dispute in the above entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above entitled suit, was, at the time of the commencement of the suit, and still is, a resident and a citizen of the city of Denver and state of Colorado.

And your petitioner offers herewith a good and sufficient surety for its entering in the Circuit Court of the United States for the district of Utah, on the first day of next session, a copy of the record of this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this Honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed to said Circuit Court of the United States in and for the district of Utah, and it will ever pray.

COLUMBIA SAVINGS & LOAN ASSOCIATION.

(Seal.) T. J. ZOLLARS, President."

STATE OF COLORADO, COUNTY OF SALT LAKE, SS.

T. J. Zollars deposes and says: I am president of the above-named petitioner. The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to these matters—it to be true.

T. J. ZOLLARS.

Subscribed and sworn to before me this 30th day of August, A. D. 1899.

LUCY J. DILLINGHAM,
Notary Public,
Arapahoe County, Colorado.

J. NORMAN,
STEPHENS & SMITH,
Petitioner's Attorneys."

On the same day appellee filed a good and sufficient bond on removal. (Record, page 10.)

On November 28, 1899, appellants filed their motion to remand this cause to the District Court of the Third Judicial District of the state of Utah, on the ground that the court was without jurisdiction because the amount in dispute did not exceed the sum of two thousand dollars, exclusive of interest and costs. ((Record, page 11.)

On November 28, 1899, appellee filed its answer and cross-complaint. (Record, page 12.)

On December 30, 1899, appellants entered a motion for leave to amend their motion to remand by adding thereto as a specific ground for the remanding of said cause that the diverse citizenship, at the time of the commencement of this action and at the time of

the removal of the same from the state court, did not appear upon the record. (Record, page 20.)

On January 2, 1900, appellee filed a motion to amend its answer and cross-complaint. (Record, page 20.)

Afterwards, on January 3d, appellee filed notice of motion to amend its petition for removal, so that said petition would show more specifically the citizenship of appellants. (Record, page 21.)

Afterwards, on January 4, 1900, after argument by counsel, the court took the motion to remand under advisement. (Record, pages 21 and 22.)

And on January 6, 1900, the court granted the motion of appellee to amend its petition for removal (Record, page 22), and appellee thereupon filed the following as its amended petition for removal:

"AMENDED PETITION FOR REMOVAL.

To the Honorable District Court of the Third Judicial District in and for the county of Salt Lake and state of Utah:

Your petitioner, The Columbia Savings and Loan Association (formerly The Columbia Building and Loan Association), a corporation, and defendant in the above entitled action, and leave of court being first duly had, hereby files its amended petition for removal, and respectfully shows to this Honorable court that the matter and amount in dispute, in the above entitled suit, exceeds, exclusive of interest and costs, the sum or value of $2,000.00.

That the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above entitled suit, was, at the time

of the commencement of said suit, ever since has been, and still is, a citizen and resident of the city of Denver and state of Colorado.

And that the plaintiffs in said suit, Antoinette B. Kinney and Clesson S. Kinney, and each of them, were, at the time of the commencement of this suit, ever since have been and still are, citizens and residents of Salt Lake City and state of Utah.

And your petitioner offers herewith a good and sufficient surety for its entering in the Circuit Court of the United States for the district of Utah, upon the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And defendant prays this Honorable court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond, and to cause the records herein to be removed to said Circuit Court of the United States in and for the district of Utah, and it will ever pray.

THE COLUMBIA SAVINGS & LOAN ASSOCIATION,

By J. NORMAN, its Vice-President.

STATE OF UTAH, COUNTY OF SALT LAKE, ss.

J. Norman, being first duly sworn, on oath deposes and says: That he is the vice-president of the above named defendant, The Columbia Savings and Loan Association; that he has read the foregoing petition for removal, and knows the contents thereof, and knows of his own knowledge that the matters therein stated are true, except as to those matters

therein stated upon information and belief, and as to such that he believes them to be true.

J. NORMAN.

Subscribed and sworn to before me this 6th day of January, A. D. 1900.

BENNER X. SMITH,
(Seal.) Notary Public."

Afterwards, on January 6, 1900, the court denied the motion of appellants to remand this cause to the state court. (Record, page 22.)

On January 6, 1900, appellee filed the following amendment to its answer:

"AMENDMENT TO DEFENDANT'S ANSWER AND CROSS-COMPLAINT.

Comes now the defendant, The Columbia Savings & Loan Association, a corporation of the state of Colorado, after leave of court first duly had, and hereby amends paragraphs first and second of its answer and cross-complaint, upon pages five and six thereof, so that said paragraphs first and second shall now read as follows:

First. That your orator, at the time of the commencement of this suit, was and ever since then, and now is, a corporation organized and existing under and by virtue of the laws of the state of Colorado, and a citizen and resident of the city of Denver and state of Colorado, and that the plaintiffs, Antoinette B. Kinney and Clesson S. Kinney, at the time of the commencement of this suit, were, and ever since have been, and still are, citizens of the state of Utah, and resi-

dents thereof, residing at the city of Salt Lake, in the said state of Utah.

Second. Your orator further avers that this is a controversy between citizens of different states, and that more than $2,000.00, exclusive of interest and costs, is involved therein.

(Signed) STEPHENS & SMITH,
Solicitors for Defendant.

STATE OF UTAH, COUNTY OF SALT LAKE, ss.

J. Norman, being first duly sworn, on oath, deposes and says: That he is the vice-president of the defendant corporation; that he has read the foregoing amendment to defendant's answer and cross-complaint and knows the contents thereof, and knows of his own knowledge that the matters therein stated are true, except as to those matters therein stated upon information and belief, and as to such that he believes them to be true.

(Signed) J. NORMAN.

Subscribed and sworn to before me this 2d day of January, A. D. 1900.

(Signed) BENNER X. SMITH,
(Seal) Notary Public."
(Record, page 23.)

On January 24, 1900, appellants filed a motion to renew their motion to amend, and on April 23, 1900, the court denied this motion. (Record, pages 24 and 25.)

Thereupon the pleadings were re-cast and the cause proceeded to final decree, dismissing the appellant's bill and finding for appellee upon its cross-bill. (Record, pages 64 to 67.)

ARGUMENT.

The only question involved in this appeal is, whether the allowance of an amendment to the petition for removal was authorized.

The suit was removed to the federal court upon the petition of the defendant, which stated as grounds for removal that the amount in dispute, exclusive of interest and costs, exceeded two thousand dollars ($2,000), and "that the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above entitled suit, was, at the commencement of the suit, and still is, a resident and citizen of Denver and state of Colorado."

It will be observed that the further formal and particular statement, that the plaintiffs, at the time of the commencement of this suit, ever since have been, and now are, citizens of the state of Utah, was omitted, this being the matter supplied by the amendment.

The petition having been founded upon the diversity of the citizenship of plaintiffs and defendant, and that fact being stated, sufficient was averred to give the federal court jurisdiction, and to authorize an amendment supply the formal and particular averments as to the citizenship of the plaintiffs.

> Stadlemann vs. White Line Towing Co., 92 Fed., 209.
>
> Johnson vs. F. C. Austin Mfg. Co., 76 Fed., 616.

In each of these cases the objection was to the failure to state the citizenship of the plaintiff at the

time of the commencement of the action, the same as in this case. There having been the general averment that the controversy was between citizens of different states, the court, in the Johnson case, by Foster, J., recognizing the ruling of this court that, where there is a want of jurisdictional averment in the record, the federal court does not obtain jurisdiction, and there can be no amendment, citing Crehore vs. Railroad Co., 131 U. S., 242; Jackson vs. Allen, 132 U. S., 27, and Stevens vs. Nichols, 130 U. S., 230, said:

> "Here is a general averment that the controversy is between citizens of different states, which is the ground upon which jurisdiction is sought to be conferred upon this court, and yet that averment is not sufficiently specific, but should be followed with the further statement showing the particular state of which each party to the litigation is a citizen. I am of opinion, however, that the general averment, that the controversy is between citizens of different states, is sufficient, under the rule established in 121 U. S., 427 (Carson vs. Dunham), to justify this court in permitting the amendment asked for."

In the Stadlemann case the court, per Lochren, J., says:

> "If the petition had failed to contain jurisdictional averments, this court would not obtain jurisdiction, and no amendment could be allowed. But it does contain the averments that the controversy is between

citizens of the different states, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of $2,000. These are the facts upon which the jurisdiction of this court depends. Yet the averment that the controversy is between citizens of different states is not sufficiently specific, but should be followed by the further statement of the particular state of which each of the parties is a citizen. Such specific statement is made as to the citizenship of the defendant, but not as to the citizenship of the plaintiff; and it is to remedy this want of specific statement that the leave to amend is sought. The fact, sought to be averred by the proposed amendment, that the plaintiff is a citizen of the state of Wisconsin, is an immaterial fact, except as it is a statement in detail of one of the facts necessary to complete with requisite certainty the statement of the ultimate and material fact (which is alleged) that the controversy is between citizens of different states. The proposed amendment, therefore, does no more than set forth in proper form, and with sufficient fullness of detail, what had originally been imperfectly stated in the petition."

The right to amend is recognized by the decisions of this court. In Powers vs. Chesapeake & Ohio Ry., 169 U. S., 92, 101, it is said:

"But if, upon the face of the petition and of the whole record of the state court,

> sufficient grounds for removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of that court, by stating more fully and distinctly the facts which support those grounds."

Citing:

> Carson vs. Dunham, 121 U. S., 421, 427, and Martin vs. Baltimore & Ohio Railroad, 151 U. S., 673, 690, 691.

The grounds for removal in the case at bar were that more than $2,000 was in controversy between citizens of different states. The averment of these facts gave the court jurisdiction; and the averment that plaintiffs and defendant were at the time of the commencement of the suit, ever since have been, and now are, citizens, etc., is simply "stating more fully and distinctly the facts which support" the ground of diverse citizenship. In other words, to the general averment is added the necessary particulars.

An amendment being permitted "stating more fully and distinctly the facts which support" the grounds for removal, the grounds for removal being jurisdictional, must permit the addition of some necessary jurisdictional fact that does not appear in the record. Unless the omitted fact be necessary, it will not be permitted to be brought into the record, for courts will not require nor permit the doing of a useless and unnecessary act. If the fact already appears in the record, its repetition in the petition would be an act of supererogation and a useless extension of the record, for "the requirements of the law are met if the citizenship of the parties to the controversy

sought to be removed is shown affirmatively by the record of the case." Steamship Company vs. Tugman, 106 U. S., 118, 122, citing Railway Company vs. Ramsey, 22 Wall., 322, and Roberts vs. Cease, 97 U. S., 646. And where the removal is upon a single ground, e. g., diverse citizenship, the right of amendment goes for nothing unless a necessary and material fact, not appearing in the record, may be supplied.

In conclusion, we submit that, where the requisite grounds for removal have been set forth, but not with sufficient fullness and particularity, the omitted particulars may be supplied by amendment; that the requisite grounds are sufficiently set forth to give the court jurisdiction to permit an amendment supplying the omitted particulars that the plaintiffs were, at the time of the commencement of this suit and still are, citizens and residents of the state of Utah, where the petition in the first instance averred that the amount in dispute, exclusive of interest and costs, exceeds the value of two thousand dollars ($2,000); that the controversy is between citizens of different states, and that defendant was, at the time of the commencement of said suit, and still is, a citizen and resident of the state of Colorado, as maintained in the Stadlemann and Johnson cases, supra, and that the right of amendment recognized in the Powers case, supra, can not otherwise be made effective.

Respectfully submitted,

J. NORMAN,
For Appellee.